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Retina Associates Medical Group, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

RETINA ASSOCIATES MEDICAL
GROUP, INC., individually and on
behalf of all others similarly situated,

Plaintiff,

v.

SUPERIOR MALPRACTICE
INSURANCE SERVICES, INC.,
AHMAD OYOUN, and NINO
ABBOUSHI,

Defendants.

CLASS ACTION
JUNK-FAX COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION JUNK-FAX COMPLAINT

1. Plaintiff Retina Associates Medical Group, Inc., individually and on behalf of all others similarly situated, brings this class action under Rule 23 of the Federal Rules of Civil Procedure against Defendants Superior Malpractice Insurance Services, Inc., Ahmad Oyouun, and Nino Abboushi for their violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), and the regulations promulgated thereunder. In support, Plaintiff alleges as follows:

PRELIMINARY STATEMENT

1
2 1. Congress first addressed the growing problem of abusive telemarketing
3 practices, including the transmission of unsolicited advertisements via facsimile
4 machines, in the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No.
5 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). As the legislative
6 history explained, because facsimile machines “are designed to accept, process, and
7 print all messages which arrive over their dedicated lines,” facsimile advertising
8 imposes burdens on unwilling recipients that are distinct from the burdens imposed by
9 other types of advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

10 2. In 2005, Congress amended the facsimile advertising provisions of the
11 TCPA in the Junk Fax Prevention Act of 2005 (JFPA), Pub. L. No. 109-21, 119 Stat
12 359 (2005), among other things, by requiring that an “opt- out” notice be provided on
13 advertisements transmitted by facsimile machines. 47 U.S.C § 227(b)(1)(C)(iii).
14 Despite these requirements, Defendants, or some person authorized to do so on their
15 behalf, have routinely and systematically caused to be sent out to Plaintiff and Class
16 Members one or more “blasts” of unsolicited fax advertisements for goods or services
17 without the proper opt-out notice required by the TCPA and its regulations (“opt-out
18 notice”).

19 3. Plaintiff and members of the proposed class have suffered an invasion of a
20 legally protected interest that is concrete and particularized.

21 4. Plaintiff and Class Members have suffered actual harm as a direct result of
22 Defendants’ transmission of unsolicited fax advertisements in violation of the TCPA.
23 The subject harm caused by Defendants’ conduct is a concrete injury because the
24 unsolicited and violative fax advertisements interfere with the legitimate business
25 enterprise of Plaintiff and Class Members. The injury caused by Defendants’ conduct
26 is particularized because it affects Plaintiff in a personal and individual way. Plaintiff
27 received the fax advertisements from Defendants that are the subject of the instant
28 action. Defendants’ transmission of the subject unsolicited and illegal fax

1 advertisements occupied Plaintiff's telephone line. Defendants' transmission of the
2 subject faxes was intrusive and potentially dangerous to Plaintiff. Defendants'
3 transmission of the subject fax advertisements caused occupied Plaintiff's fax machine
4 and rendered the machine unavailable to receive other fax messages for some period of
5 time. Defendants' transmission of the unsolicited fax advertisements interfered with
6 Plaintiff's legitimate business enterprise.

7 5. The TCPA provides a private cause of action for violation of its
8 provisions and violations of the rules promulgated under the Act. Defendants are
9 therefore liable to Plaintiff and the proposed Class of similarly situated persons under
10 the TCPA, and for Class Members and itself individually, Plaintiff seeks an injunction,
11 requiring Defendants to cease all junk faxes and an award of statutory damages to
12 Plaintiff and Class Members, together with costs and reasonable attorneys' fees.

13 **JURISDICTION AND VENUE**

14 6. This Court has federal question subject matter jurisdiction pursuant to 28
15 U.S.C. § 1331 and 47 U.S.C. § 227.

16 7. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2),
17 because a substantial part of the events or omissions giving rise to the claims in this
18 case occurred in this District.

19 8. The Court has personal jurisdiction over Defendants because they reside
20 in or conduct business in this state, including substantial business in this district, and
21 Defendants have committed tortious acts within this state, including conversion of fax
22 recipients' paper, ink, and toner.

23 **PARTIES**

24 9. Plaintiff's principal place of business is in Orange County, California.
25 Plaintiff is a citizen of the state of California.

26 10. Defendant Superior Malpractice Insurance Services, Inc. (SMISI), is a
27 California limited liability in good standing with the California Secretary of State.
28

1 11. Defendant Ahmad Oyoun is an individual who resides in Los Angeles
2 County, California.

3 12. Oyoun is Chief Executive Officer and Chief Financial Officer of SMISI.

4 13. Defendant Nino Abboushi is an individual who resides in Los Angeles
5 County, California.

6 14. Abboushi is Secretary of SMISI.

7 15. SMSI's current website is <http://www.smalpractice.com> (last visited Nov.
8 27, 2018).

9 16. SMISI's prior website stated, "Directors and officers can be held
10 personally liable for claims; organizations increasingly consider personal liability
11 coverage as one of the most important aspects of their D&O."
12 <http://www.superiormalpractice.com/directors-officers> (last visited Aug. 18, 2017).

13 17. Defendants, directly or through other persons acting on their behalf,
14 conspired to, agreed to, contributed to, assisted with, or otherwise caused all of the
15 wrongful acts and omissions, including the dissemination of the junk faxes that are the
16 subject matter of this Complaint.

17 **THE TCPA AND CORRESPONDING REGULATIONS**

18 18. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. 102-
19 243, § 3(a), added Section 227 to Title 47 of the United States Code, 47 U.S.C. § 227.

20 19. In pertinent part, 47 U.S.C. § 227(b) provides "[i]t shall be unlawful for
21 any person within the United States, or any person outside the United States if the
22 recipient is within the United States . . . to use any telephone facsimile machine,
23 computer, or other device to send an unsolicited advertisement to a telephone facsimile
24 machine[.]"

25 20. An "unsolicited advertisement" is defined in the TCPA as "any material
26 advertising the commercial availability or quality of any property, goods, or services
27 which is transmitted to any person without that person's prior express invitation or
28 permission." 47 U.S.C. § 227(a)(5). Under TCPA regulations, "[t]he term

1 advertisement means any material advertising the commercial availability or quality of
2 any property, goods, or services.” 47 C.F.R. § 64.1200(f)(1).

3 21. In enacting 47 U.S.C. § 227(b), Congress concluded that a prohibition on
4 unsolicited facsimile advertisements is “the *minimum* necessary to protect unwilling
5 recipients from receiving fax messages that are detrimental to the owner's uses of his or
6 her fax machine.” S. Rep. No. 178, 102d Cong., 1st Sess. 6 (1991), 1991 U.S.C.C.A.N.
7 1969, 1975-76 (emphasis added).

8 22. Accordingly, the amended regulations further provide the additional
9 protection that “[a] facsimile advertisement that is sent to a recipient that has provided
10 prior express invitation or permission to the sender must include an opt-out notice that
11 complies with the requirements in paragraph (a)(4)(iii) of this section. 47 C.F.R. §
12 64.1200(a)(4)(iv).

13 23. Under the TCPA and 47 C.F.R. § 64.1200(a)(3)(iii), the opt-out notice
14 required for all unsolicited facsimile advertisements must meet the following criteria:

- 15 (A) The notice is clear and conspicuous and on the first page of the
16 advertisement;
- 17 (B) The notice states that the recipient may make a request to the sender of
18 the advertisement not to send any future advertisements to a telephone
19 facsimile machine or machines and that failure to comply, within 30 days,
20 with such a request meeting the requirements under paragraph (a)(4)(v) of
21 this section is unlawful;
- 22 (C) The notice sets forth the requirements for an opt-out request under
23 paragraph (a)(4)(v) of this section;
- 24 (D) The notice includes--
 - 25 (1) A domestic contact telephone number and facsimile machine number
26 for the recipient to transmit such a request to the sender; and
 - 27 (2) If neither the required telephone number nor facsimile machine
28 number is a toll-free number, a separate cost-free mechanism including a

1 Web site address or e-mail address, for a recipient to transmit a request
2 pursuant to such notice to the sender of the advertisement. A local
3 telephone number also shall constitute a cost-free mechanism so long as
4 recipients are local and will not incur any long distance or other separate
5 charges for calls made to such number; and

6 (E) The telephone and facsimile numbers and cost- mechanism identified in
7 the notice must permit an individual or business to make an opt-out
8 request 24 hours a day, 7 days a week.

9 24. Senders of unsolicited faced advertisements must fully comply with the
10 opt-out notice requirements of 47 C.F.R. § 64.1200(a)(4)(iii).

11 **DEFENDANTS' UNLAWFUL COURSE OF CONDUCT**

12 25. Upon information and belief, Defendants have in the past four years
13 systematically and under a uniform policy and procedure sent or arranged to be sent
14 hundreds, or thousands, of fax advertisements, advertising the commercial availability
15 or quality of any property, goods, or services, to fax machines or computers to fax
16 machines throughout California, including those of Plaintiff and Class Members, which
17 did not contain an opt-out notice as required by the TCPA.

18 26. The fax advertisements that Defendants caused to be sent contain
19 preprinted, standardized text and format.

20 27. Defendants' advertising by fax was not sporadic or unorganized, but
21 instead was part of a well-organized mass advertising tactic and campaign.

22 28. Each fax advertisement sent to Plaintiff and, upon information and belief,
23 to each Class Member routinely failed to include the opt-out notice required by the
24 TCPA and its regulations.

25 29. An exemplar of one of the fax advertisements that Defendants have sent
26 or caused to be sent to Plaintiff and Class Members is attached hereto as **Exhibit A**.

27 30. Exhibit A's opt-out notice states, "**If you would like to be removed from**
28 **future fax or update please call (833) 366-7566.**"

1 31. The opt out-notice on Exhibit A omits the required statement that “the
2 recipient may make a request to the sender of the advertisement not to send any future
3 advertisements to a telephone facsimile machine or machines and that failure to
4 comply, within 30 days, with such a request meeting the requirements under paragraph
5 [47 C.F.R. § 64.1200] (a)(4)(v) of this section is unlawful.” *See* 47 C.F.R. §
6 64.1200(a)(4)(iii)(B).

7 32. Exhibit A does not include the mandatory disclosure indicating how a
8 recipient must opt out of receiving future facsimile advertisements as set forth in 47
9 C.F.R. § 64.1200(a)(4)(iii)(C) and (4)(v) and does not include a “facsimile machine
10 number for the recipient to transmit such a request to the sender,” as required by 47
11 C.F.R. § 64.1200(a)(4)(iii)(D)(I).

12 33. Upon information and belief, Defendants’ sending of the foregoing fax
13 and others, or Defendants’ causing them to be sent, was conscious and deliberate.
14 Defendants either directly participated in sending the faxes itself or an agent or
15 contractor or third party, i.e., “127 High Street, Inc.” or “Wabos Technologies, Inc.
16 d/b/a 127 High Street,” did so on Defendants’ behalf with Defendants’ knowledge.

17 34. Upon information and belief, Defendants’ sending of the faxes or their
18 causing them to be sent was performed without due care; with reckless disregard
19 concerning the rights and obligations under the TCPA; or when Defendants had reason
20 to know, or should have known, that their conduct or the conduct of those acting on
21 their behalf could constitute a violation of the statute.

22 35. Upon information and belief, Defendants’ course of conduct set out above
23 is ongoing and adverse to the public interest and the policies underlying the TCPA.
24 Unless enjoined and restrained by an order of this Court, Defendants will continue to
25 engage in the unlawful acts and practices set out herein. Such actions and conduct by
26 Defendant have violated the TCPA rights of Plaintiff and Class Members and
27 Defendants’ duties to them under the TCPA, and unless enjoined by the Court
28

Defendants will continue to aggrieve Plaintiff and Class Members and others in the future.

FACTS CONCERNING THE REPRESENTATIVE PLAINTIFF

36. Plaintiff still has telephone facsimile service at (714) 633-7470 at its place of business in Orange, California. Plaintiff receives facsimile transmissions (faxes) at this number, using a telephone facsimile machine (fax machine).

37. On June 8, 2016, Defendants, without Plaintiff's express invitation or permission, arranged for or caused a telephone facsimile machine, computer, or other device to send an unsolicited fax advertisement, advertising the commercial availability or quality of any property, goods, or services, to Plaintiff's fax machine located at its principal place of business. A copy of the fax advertisement is attached hereto as **Exhibit A** and is incorporated herein by reference.

38. **Exhibit A** was unsolicited in that Defendants sent it to Plaintiff without Plaintiff's express invitation or permission. In addition, as stated above, **Exhibit A** lacks the opt-out notice required by the TCPA.

CLASS ACTION ALLEGATIONS

39. Plaintiff brings this class action under Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure on behalf of itself and of a similarly situated "Class" or "Class Members" defined as:

All persons in California who (1) on or after four years prior to the filing of this action, (2) were sent a telephone facsimile message of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, (3) with respect to whom Defendants cannot provide evidence of prior express invitation or permission for the sending of such faxes, and (4) with whom Defendants do not have an established business relationship, and (5) which (a) did not display a clear and conspicuous opt-out notice on the first page stating that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful or (b) lacked a facsimile number for sending the opt-out request.

Excluded from the Class Defendants, their employees, agents, and members of the federal judiciary.

1 40. This action has been brought and may properly be maintained as a class
2 action against Defendants pursuant to Rule 23 of the Federal Rules of Civil Procedure
3 because there is a well-defined community of interest in the litigation and the proposed
4 Class is easily ascertainable. Plaintiff reserves the right to amend the Class definition if
5 discovery and further investigation reveal that any Class should be expanded or
6 otherwise modified.

7 41. **Numerosity:** At this time, Plaintiff does not know the exact number of
8 Class Members, but among other things, given the nature of the claims and that
9 Defendants' conducted consisted of a standardized fax campaign and widely
10 disseminated standardized fax electronically sent to particular telephone numbers,
11 Plaintiff believes, at a minimum, there are hundreds of Class Members. Plaintiff
12 believes that the Class is so numerous that joinder of all members of the Class is
13 impracticable and the disposition of their claims in a class action rather than
14 incremental individual actions will benefit the Parties and the Court by eliminating the
15 possibility of inconsistent or varying adjudications of individual actions.

16 42. Upon information and belief, a more precise Class size and the identities
17 of the individual members thereof are ascertainable through Defendants' records,
18 including, but not limited to Defendants' fax and marketing records.

19 43. Members of the Class may additionally or alternatively be notified of the
20 pendency of this action by techniques and forms commonly used in class actions, such
21 as by published notice, e-mail notice, website notice, fax notice, first class mail, or
22 combinations thereof, or by other methods suitable to this class and deemed necessary
23 or appropriate by the Court.

24 44. **Existence and Predominance of Common Questions of Fact and Law:**
25 There is a well-defined community of common questions of fact and law affecting the
26 Plaintiff and members of the Class. Common questions of law or fact exist as to all
27 members of the Class and predominate over the questions affecting individual Class
28

1 members. These common legal or factual questions include, but are not limited to, the
2 following:

3 (a) Whether Defendants or someone acting on Defendants' behalf sent fax
4 advertisements promoting the commercial availability or quality of any property,
5 goods, or services to Plaintiff and Class Members and the legal relationship
6 between Defendants and any person sending those faxes on its behalf;

7 (b) Whether the fax advertisements sent to Plaintiff and Class Members were
8 sent via mass or organized advertising campaigns and how Defendants acquired
9 the names and fax numbers of Plaintiff and Class Members;

10 (c) Whether the fax advertisements sent to Plaintiff and Class Members
11 contained the opt-out notice required by the TCPA and its regulations;

12 (d) Whether the fax advertisements sent to Plaintiff and Class Members
13 violate the TCPA and its regulations;

14 (e) Whether Defendants willfully or knowingly violated the TCPA or the
15 rules prescribed under it;

16 (f) Whether Plaintiff and the members of the Class are entitled to statutory
17 damages, treble damages, and attorney fees and costs for Defendants' acts and
18 conduct;

19 (g) Whether Plaintiff and members of the Class are entitled to statutory
20 damages per facsimile or per violation of the TCPA and its regulations; and

21 (h) Whether Plaintiff and members of the Class are entitled to a permanent
22 injunction enjoining Defendants from continuing to engage in its unlawful
23 conduct.

24 45. One or more questions or issues of law or fact regarding Defendants'
25 liability are common to all Class Members and predominate over any individual issues
26 that may exist and may serve as a basis for class certification under Rule 23(c)(4).
27
28

1 46. **Typicality:** Plaintiff's claims are typical of the claims of the members of
2 the Class. The claims of the Plaintiff and members of the Class are based on the same
3 legal theories and arise from the same course of conduct that violates the TCPA.

4 47. Plaintiff and members of the Class each received at least one fax
5 advertisement, advertising the commercial availability or quality of any property,
6 goods, or services, which contained no purported opt-out notice, which Defendants
7 sent or caused to be sent to Plaintiff and the members of the Class.

8 48. **Adequacy of Representation:** Plaintiff is an adequate representative of
9 the Class because Plaintiff's interests do not conflict with the interests of the members
10 of the Class. Plaintiff will fairly, adequately and vigorously represent and protect the
11 interests of the members of the Class and has no interests antagonistic to the members
12 of the Class. Plaintiff has retained counsel competent and experienced in litigation in
13 the federal courts, TCPA litigation, and class-action litigation.

14 49. **Superiority:** A class action is superior to other available means for the
15 fair and efficient adjudication of the claims of the Class. While the aggregate damages
16 which may be awarded to the members of the Class are likely to be substantial, the
17 damages suffered by individual members of the Class are relatively small. As a result,
18 the expense and burden of individual litigation makes it economically infeasible and
19 procedurally impracticable for each member of the Class to individually seek redress
20 for the wrongs done to them. Plaintiff does not know of any other litigation concerning
21 this controversy already commenced against Defendants by any member of the Class.
22 The likelihood of the individual members of the Class prosecuting separate claims is
23 remote. Individualized litigation would also present the potential for varying,
24 inconsistent or contradictory judgments, and would increase the delay and expense to
25 all parties and the court system resulting from multiple trials of the same factual issues.
26 In contrast, the conduct of this matter as a class action presents fewer management
27 difficulties, conserves the resources of the parties and the court system, and would
28 protect the rights of each member of the Class. Plaintiff knows of no difficulty to be

1 encountered in the management of this action that would preclude its maintenance as a
2 class action.

3 **50. Class-Wide Injunctive Relief and Rule 23(b)(2):** Moreover, as an
4 alternative to or in addition to certification of the Class under Rule 23(b)(3), class
5 certification is warranted under Rule 23(b)(2) because Defendants have acted on
6 grounds generally applicable to Plaintiff and members of Class, thereby making
7 appropriate final injunctive relief with respect to Plaintiff and Class Members as a
8 whole. Plaintiff seeks injunctive relief on behalf of Class Members on grounds
9 generally applicable to the entire Class in order to enjoin and prevent Defendants'
10 ongoing violations of the TCPA, and to order Defendants to provide notice to them of
11 their rights under the TCPA to statutory damages and to be free from unwanted faxes.

12 **COUNT I**
13 **Telephone Consumer Protection Act**
 (Violation of 47 U.S.C. § 227)

14 51. Plaintiff repeats each and every allegation contained in all of the above
15 paragraphs and incorporates such allegations by reference.

16 52. Plaintiff brings this action individually and on behalf of the Class defined
17 above against Defendants for violation of the TCPA and the rules prescribed under it
18 by the FCC.

19 53. At all times material to this action, Defendants were each a person that
20 used or caused to be used a “telephone facsimile machine, computer, or other device”
21 to send, to a “telephone facsimile machine” an “unsolicited advertisement” or an
22 “advertisement” within the meaning of the TCPA and its regulations.

23 54. Defendants sent or caused to be sent hundreds or thousands of these
24 advertisements exemplified by Exhibit A. Plaintiff and each Class Members received
25 at least one of them.

26 55. Each of the foregoing advertisements violated the TCPA because they
27 failed to contain the opt-out notice required by 47 U.S.C § 227(b)(1)(C)(iii); 47 C.F.R.
28 § 64.1200(a)(4)(iv); and 47 C.F.R. § 64.1200(a)(4)(iii).

1 56. Accordingly, Plaintiff and the members of the Class are entitled to
2 statutory damages under 47 U.S.C. § 227(b).

3 57. If it is found that Defendants willfully or knowingly sent or caused to be
4 sent fax advertisements to Plaintiff and the members of Class in violation of the TCPA,
5 Plaintiff requests an increase by the Court of the damage award against Defendants,
6 described in the preceding paragraph, to three times the amount available under 47
7 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3) for willful or knowing
8 violations.

9 58. Furthermore, Plaintiff and members of the Class are entitled to an order
10 enjoining Defendants' violations of the TCPA under 47 U.S.C. § 227(b), because:
11 Defendants have violated their TCPA rights and Defendants' duties owed to them
12 under the statute; Defendants' violations continue and will continue to violate the
13 statutory rights of Plaintiff and Class Members and others in the future; there is no
14 fully adequate remedy at law for Defendants' conduct; irreparable injury will be
15 suffered unless an injunction is issued to stop Defendants from violating the TCPA;
16 any potential injury to Defendants attributable to an injunction is outweighed by the
17 injury that Plaintiff and Class Members and the public will suffer if such injunction is
18 not issued; and the injunction would not be adverse to the public interest.

19 **WHEREFORE**, Plaintiff prays that the Court enter judgment in favor of it
20 and the Class and against Defendants, jointly and severally, for:

- 21 A. An order certifying the Class under Rule 23(a); and Rule 23 (b)(2), (b)(3)
22 or both, or as to particular issues under Rule 23(c)(4); and appointing
23 Plaintiff as the representative of the Class; and appointing Plaintiff's
24 counsel as counsel for the Class;
- 25 B. An award to Plaintiff and the members of the Class of statutory damages
26 pursuant to 47 U.S.C. § 227(b)(3), for each of Defendants' violations of
27 that statute.
28

- 1 C. If it is found that Defendants willfully or knowingly sent or caused to be
2 sent fax advertisements to the Class in violation of the TCPA, an increase
3 by the Court of the award of statutory damages pursuant to 47 U.S.C. §
4 227(b) prayed for to three times that amount described in the previous
5 paragraph, as authorized by 47 U.S.C. § 227(b)(3), for willful or knowing
6 violations.
- 7 D. An injunction against Defendants, prohibiting Defendants from
8 committing further violations of the TCPA and the regulations
9 promulgated thereunder;
- 10 E. An award of attorney's fees and costs; and,
- 11 F. Such other and further relief as the Court may deem just and proper.

12 **JURY DEMAND**

13 Plaintiff requests a trial by jury.

14 **DOCUMENT PRESERVATION DEMAND**

15 Plaintiff demands that Defendants take affirmative steps to preserve all records,
16 lists, electronic databases or other itemization of telephone or fax numbers associated
17 with the Defendants and the communication or transmittal of advertisements as alleged
18 herein.

19 Dated: November 29, 2018

EDWARDS POTTINGER LLC

20
21 By /s/ Seth M. Lehrman

22 SETH M. LEHRMAN

23 Attorneys for Plaintiff

24 Retina Associates Medical Group, Inc.
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